

**FILED BY CLERK**

**MAR 25 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0296-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
RICHARD LAWRENCE LONG,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

---

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-38212

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

---

Barton & Storts, P.C.  
By Brick P. Storts, III

Tucson  
Attorneys for Petitioner

---

ESPINOSA, Presiding Judge.

¶1 Following a jury trial, Richard Long was convicted of child molestation and sexual abuse, both dangerous crimes against children. The trial court sentenced him to presumptive, consecutive prison terms of seventeen and ten years for each conviction, respectively. This court affirmed his convictions and sentences on appeal. *State v. Long*,

No. 2 CA-CR 93-0465 (memorandum decision filed Dec. 22, 1994). Long filed his first notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in July 1995. That proceeding was dismissed after Long filed a motion to withdraw his notice.

¶2 Long filed a second post-conviction relief proceeding in 2008, claiming his trial counsel had been ineffective for choosing “a bizarre strategy at trial.” He also claimed his ten-year sentence for sexual abuse was excessive and violated constitutional prohibitions against cruel and unusual punishment. He argued that his claim of ineffective assistance of counsel was not precluded because, although he had filed a previous notice of post-conviction relief, he had not knowingly, voluntarily and intelligently withdrawn that notice. He also noted that “[c]onstitutional claims may also be an exception to preclusion.” And, he asserted his sentencing challenge was “based upon a change in the statutory scheme” that he contended was “in a sense a change in the law.” The trial court addressed Long’s claims on the merits, finding that preclusion did not clearly apply, and denied relief. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶3 Rule 32.2(a)(1) and (3) provide that “[a] defendant shall be precluded from relief under this rule based upon any ground” that is “[r]aisable on direct appeal” or “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.” Certain specified claims are excepted from the rule of preclusion pursuant to Rule 32.2(b), including claims based on a significant change in the law under

Rule 32.1(g). Additionally, a claim of “sufficient constitutional magnitude” may only be deemed waived if the state shows the defendant “‘knowingly, voluntarily and intelligently’ waived the claim.” Ariz. R. Crim. P. 32.2 cmt.

¶4 Generally, a defendant must raise claims of ineffective assistance of counsel, if at all, in his or her initial Rule 32 proceeding. *See State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, *or could have been raised*, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.”) (emphasis altered). Although raised in his second post-conviction proceeding, Long contended that his claim was of sufficient constitutional magnitude it could not be regarded as waived absent a knowing, voluntary, and intelligent waiver. And, he contended, his motion to withdraw his first Rule 32 proceeding constituted none of those things.

¶5 Long’s initial Rule 32 counsel stated in the motion to withdraw that he had determined no colorable claim for relief existed and that, following discussion, Long had agreed with counsel’s research and conclusions. Long suggests that his withdrawal of the notice of post-conviction relief cannot be regarded as a waiver of all claims that he could have raised in that proceeding unless his waiver of any such claims was knowing, voluntary, and intelligent. We are not persuaded by Long’s argument. Whether a waiver must be knowing, voluntary, and intelligent depends on the nature of the claim. *See Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954. Additionally, as our supreme court has

explained, “if [a] petitioner asserts ineffective assistance of counsel for the first time in a successive Rule 32 petition, the question of preclusion is determined by the nature of the right allegedly affected by counsel’s ineffective performance.” *Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002). Only “[i]f that right is of sufficient constitutional magnitude to require personal waiver by the defendant” is such a waiver required. *Id.* “[T]he court must determine the particular right involved by looking at the facts of the claim, not to decide its merits, but to decide whether, at its core, the claim implicates a significant right that requires a knowing, voluntary, and intelligent waiver for preclusion to apply.” *Id.*

¶6 As noted above, Long’s claim of ineffective assistance of counsel is based on his assertion that trial counsel chose a bizarre or ineffective trial strategy. In *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984), our supreme court recognized that, “[i]n keeping with the rights vested in an accused under the Constitution, certain basic decisions have come to belong to an accused.” For example, “[t]he ultimate decisions on whether to plead guilty, whether to waive jury trial, and whether to testify are to be made by the [defendant].” *Id.* But the court also stated that “the power to decide questions of trial strategy and tactics,” resides “[o]n the other hand, . . . with counsel.” *Id.* Thus, we conclude that Long’s claim of ineffective assistance of counsel does not implicate a right of sufficient constitutional magnitude to exempt it from the rule of preclusion.

¶7 Long’s claim of sentencing error was similarly precluded because it could have been raised on appeal. Long neither raised it on appeal nor has he asserted that

appellate counsel was ineffective for failing to do so. And, contrary to his contention in this post-conviction proceeding, the claim cannot be characterized as one that falls under Rule 32.1(g), which is excepted from the rule of preclusion. Rule 32.1(g) provides that a defendant may obtain post-conviction relief if “[t]here has been a significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence.” But Long has not identified any change in the law applicable to his case. The only change in the law he has identified is to the sentencing range currently applicable to a claim of sexual abuse based on conduct similar to his. But this change does not apply to his case. *See* A.R.S. § 1-244 (“No statute is retroactive unless expressly declared therein.”); A.R.S. § 1-246 (criminal offenders punished according to “law in force when the offense was committed”).

¶8 Having determined that both of Long’s claims for relief are precluded, we find no abuse of discretion in the trial court’s summary denial of post-conviction relief. *See* Ariz. R. Crim. P. 32.6(c). Accordingly, although we grant Long’s petition for review, we deny relief.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge